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13 Attorneys for Secured Creditor Boston Private Bank  
14 & Trust Company, formerly known as and successor  
15 to Borel Private Bank & Trust Company

16 UNITED STATES BANKRUPTCY COURT  
17  
18 NORTHERN DISTRICT OF CALIFORNIA  
19  
20 SAN JOSE DIVISION

21 In re:

22 272 E. Santa Clara Grocery, LLC,  
23 Debtor.

CASE NO. 13-53491  
RS No.  
CHAPTER 11

**DECLARATION OF DAVID SCHEIBER  
IN SUPPORT OF SECURED CREDITOR  
BOSTON PRIVATE BANK & TRUST  
COMPANY'S MOTION FOR ORDER  
CONFIRMING NO STAY IS IN EFFECT  
WITH RESPECT TO RENT**

Hearing

Date: August 21, 2013  
Time: 2:00 p.m.  
Place: 280 S. First Street  
San Jose, CA  
Courtroom 3099  
Judge: Hon. Stephen L. Johnson

24 I, David Scheiber, declare as follows:

25  
26 1. I am a Senior Vice President – Special Assets Department of Secured Creditor  
27 Boston Private Bank & Trust Company (“BPB”), successor in interest by merger to and formerly  
28

1 known as Borel Private Bank & Trust Company. I have been assigned the responsibility for  
2 administration and enforcement of the loan ("Loan") which is secured by the property now owned  
3 by the debtor in this case. As part of my responsibilities, I have become familiar with the BPB's  
4 loan documents for the Loan, its accounting of sums due and owing under the Loan, and the  
5 supervision of the Loan by BPB personnel before me. Except as to those matters stated upon  
6 information and belief, I have personal knowledge of the matters set forth in this declaration  
7 based upon my personal review of BPB's business records, discussions with other BPB staff and  
8 communications with the manager of the current owner of the property. If called upon to do so, I  
9 could and would competently testify thereto.

10 2. I make this declaration in support of BPB's Motion for Order Confirming No Stay  
11 Is In Effect With Respect to Rent being collected by BPB pursuant to a recorded assignment of  
12 rents agreement, a deed of trust and BPB's enforcement of its assignment of rents pursuant to a  
13 pre-petition notice to the tenant under California Civil Code section 2938 to pay rent directly to  
14 BPB. The rents are being paid to BPB by the tenant at the real property located at 272 East Santa  
15 Clara Street, San Jose, CA 95112 (Assessor's Parcel No. 467-24-111) (the "Property").

16 3. BPB has never had a lending relationship with Debtor 272 E. Santa Clara Grocery,  
17 LLC ("E. Santa Clara LLC"). BPB's borrower was and is an entity known as Kimomex Santa  
18 Clara, LLC ("Kimomex").

19 4. On or about July 15, 2008, Kimomex executed and delivered to Borel Private  
20 Bank & Trust Company ("Borel") a Promissory Note, a first Deed of Trust ("Deed of Trust"), an  
21 Assignment of Rents ("Assignment of Rents"), and other documents (collectively, the "Loan  
22 Documents") in connection with a loan by Borel to Kimomex in the original principal amount of  
23 \$3,600,000.00. A true and correct copy of the Promissory Note is attached hereto as **Exhibit A**.  
24 A true and correct copy of the Deed of Trust is attached hereto as **Exhibit B**. A true and correct  
25 copy of the Assignment of Rents is attached hereto as **Exhibit C**. Both the Deed of Trust and the  
26 Assignment of Rents were recorded against the Property on or about July 18, 2008 in the Office  
27 of the Santa Clara County Recorder. BPB is the successor by merger of Borel and is now the  
28 lender, assignee and beneficiary under the Loan Documents.

1           5. Pursuant to the terms of the Promissory Note and other Loan Documents,  
2 Kimomex borrowed the maximum principal sum of \$3,600,000.

3           6. I am informed and believe that thereafter on or about May 14, 2009, Kimomex  
4 also borrowed a sum from a group of individuals and secured its obligation to said parties through  
5 a junior deed of trust ("Junior Deed of Trust") dated on said date and recorded on May 21, 2009.  
6 A true and correct copy of the Junior Deed of Trust, obtained from the public records, is attached  
7 hereto as **Exhibit D**. I am further informed and believe that the Trustee later caused the Junior  
8 Deed of Trust to be foreclosed under its power of sale. I am further informed and believe that the  
9 Property was sold at the trustee's sale to the beneficiaries under the Junior Deed of Trust. I am  
10 further informed and believe that the Trustee's Deed, dated October 27, 2011 was recorded on  
11 April 20, 2012. A true and correct copy of the Trustee's Deed, obtained from the public records,  
12 is attached hereto as **Exhibit E**. I am further informed and believe that the beneficiaries thereafter  
13 conveyed all of their right, title and interest in the Property to debtor E. Santa Clara LLC by Grant  
14 Deed recorded on April 20, 2012. A true and correct copy of the Grant Deed, also obtained from  
15 the public records, is attached hereto as **Exhibit F**. E. Santa Clara LLC therefore appears to be  
16 the successor to the beneficiary of a deed of trust junior and its interest in the Property is  
17 subordinate to the Deed of Trust and Assignment of Rents of BPB.

18           7. Kimomex breached its obligations to BPB under the Loan Documents when it  
19 failed to make monthly payments when due beginning before mid-2011 and failed to pay all  
20 property taxes for the Property when due. In addition, the conveyances of the Property under the  
21 Junior Deed of Trust, under the Trustee's Deed and under the Grant Deed described in paragraph  
22 6 above were all done without BPB's consent and therefore are in breach of the "due on sale"  
23 covenant in the Deed of Trust. As of June 27, 2013, the outstanding principal balance due and  
24 owing from Kimomex under the Promissory Note and other Loan Documents is \$3,341,017.20.  
25 In addition to principal there is due, owing and unpaid accrued interest, late charges and other  
26 fees and costs, and attorneys' fees and legal costs in amounts to be determined.

27           8. The current tenant of the Property is Grocery Outlet Inc. ("Tenant"), a California  
28 corporation. The Property is currently being used commercially as a grocery store. I am

1 informed that the current monthly rent being paid by the Tenant of the Property is \$39,600.00.  
2 On about May 17, 2013, pursuant to Civil Code section 2938, BPB enforced its rights and  
3 delivered written notice ("Notice") to that Tenant to pay rent directly to BPB pursuant to the Loan  
4 Documents. A copy of that Notice is attached hereto as **Exhibit G**. The Tenant subsequently  
5 acknowledged receipt of the Notice. Pursuant to the Notice, BPB was paid the June rent by the  
6 Tenant on or about June 11, 2013.

7 9. Also pursuant to the Notice, the Tenant has now paid the July rent to BPB. BPB is  
8 holding that rent pending the outcome of this Motion.

9 I declare under penalty of perjury under the laws of the State of California that the  
10 foregoing is true and correct, and that this declaration was executed on July 10, 2013 at Encino,  
11 California.

12 /s/ David Scheiber  
13 David Scheiber  
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